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NOTES.

COVENANTS FOR PARTY WALLS.—A recent decision, *Hoffman* v. *Dickson* (1907) 92 Pac. 272, settles the law of Washington in accordance with what is now the judicial tendency, *Southworth* v. *Perring* (1905) 71 Kan. 755, that both the benefits and burdens of covenants for party walls run with the land at law. The usual agreement provides that A shall build the wall and B shall have the right to use it upon payment of one-half the original cost: the agreement to bind the heirs and assigns of both parties. Normally the wall when built is owned by A and B in severalty, subject to cross easements. Sometimes, however, A is held to own the entire wall, half of which rests on B's land. *Brown* v. *Pentz* (N. Y. 1851) 1 Abb. App. Dec. 227; *National Life Ins. Co.* v. *Lee* (1899) 75 Minn. 157. Conceivably the parties might effect such a result, to which the law of fixtures would present no obstacle; *Brown* v. *McKee* (1874) 57 N. Y. 684, 2 N. Y. City Ct. Rep. 320; but this is hardly a fair interpretation of

their intention. *Richardson* v. *Tobey* (1877) 121 Mass. 457; *Maine* v. *Cumston* (1867) 98 Mass. 317. Assuming, however, that B's contract is thus one for the purchase of land, *Mickel* v. *York* (1898) 175 Ill. 62, the law of running covenants has evidently no application, and B's grantee is not liable on the covenant, since he has made no contract. *Comstock* v. *Hitt* (1865) 37 Ill. 542. Even on the hypothesis that B had assigned the contract with his land, A or his grantee could acquire only the right to a specific performance of the contract, by foreclosure of the assignee's equitable interest in the wall: a proceeding which would seem offensive to the Rule against Perpetuities. *London etc. Ry.* v. *Gomm* (1882) L. R. 20 Ch. Div. 562. If A and his successors get title only until payment is made, *Standish* v. *Lawrence* (1872) 111 Mass. 111; *First Nat'l Bank* v. *Security Bank* (1895) 61 Minn. 25, the intention of the parties is probably to vest an absolute fee in A, with a contract for its purchase upon user, although in the decisions no conveyance of the wall appears. If A acquires merely a defeasible fee, his interest would pass upon user, without the need of a conveyance; but the agreement would not operate as a contract at all. B's grantee might be held on the ground of an implied promise to pay for the use he has made of another's property; but the recovery would be based on the value of the use, not on the cost of the wall. Whether A has title to the wall or not, the land of B may be held liable in the hands of purchasers with notice, even when the agreement is only parol, on the ground of equitable charge, *Keating* v. *Korfhage* (1885) 88 Mo. 524; *Burr* v. *Lamaster* (1890) 30 Neb. 688, or, more accurately, lien, *Arnold* v. *Chamberlain* (1896) 14 Tex. Civ. App. 34, enforcible by A or his grantee, even in jurisdictions where covenants for party walls do not run at law; but the parties must so have intended. *Mott* v. *Oppenheimer* (1892) 135 N. Y. 312. The recovery is not upon the covenant, but includes a decree establishing the lien, and if necessary providing for a sale of the land, *Fresno Canal Co.* v. *Dunbar* (1889) 80 Cal. 530, a distinction sometimes overlooked. *Garmire* v. *Willy* (1893) 36 Neb. 340. The occasional intimation that party wall covenants are restrictive in character, *Sharp* v. *Cheatham* (1885) 88 Mo. 498, seems futile unless they touch and concern the land. *W. Va. Transp. Co.* v. *Ohio etc. Co.* (1883) 22 W. Va. 600; *Kettle River Ry. Co.* v. *Eastern Ry. Co.* (1889) 41 Minn. 461. As to this see *infra.*

The basic reason for allowing the benefit of covenants to run—that the covenant favorably affects the land of the covenantee, *Austerberry* v. *Oldham* (1885) L. R. 29 Ch. Div. 750, 776; *Rogers* v. *Hosegood* (1900) L. R. 2 Ch. 388, 395—is lacking in the case of covenants for party walls. The performance of the covenant would be of no direct advantage to the land of A; nor would it affect its nature or quality, or the mode of enjoying it; see *Congleton* v. *Pattison* (1808) 10 East 130; nor would it enhance its value, except upon the assumption that the covenant bound the assigns of both parties—the question at issue. There is no benefit incident to the land, as there might be in the case of a covenant to pay taxes, *Post* v. *Kearney* (1849) 2 N. Y. 394. The contract seems purely collateral. *Cole* v. *Hughes* (1873) 54 N. Y. 444; *Gibson* v. *Holden* (1885) 115 Ill. 199.

That the benefit of these covenants does not run is not, however, con-

clusive as to the burden, *Conduit* v. *Ross* (1885) 102 Ind. 166, save where the theory prevails that the only covenants which run with the land are those which create easements. *Lincoln* v. *Burrage* (1901) 177 Mass. 378. Yet under the English requirements of privity, which are not satisfied by the grant of an incorporeal hereditament, *Hayward* v. *Bldg. Society* (1881) 8 Q. B. Div. 403, the usual form of party wall agreement is clearly insufficient to allow the burden to run. In this country also, where such a grant does constitute privity, *Nye* v. *Hoyle* (1890) 120 N. Y. 195; 2 COLUMBIA LAW REVIEW 554, it is submitted that the burden should be held personal to the covenantor. The agreement has been considered to imply a grant to A of an easement of way to enter B's lot and erect the wall, *Conduit* v. *Ross, supra,* and of an easement of support of the wall by B's land. *Roche* v. *Ulman* (1882) 104 Ill. 11; *King* v. *Wight* (1892) 155 Mass. 444. But a covenant to pay a sum of money does not bear the slightest relation to either of these easements. See *Morse* v. *Aldrich* (1837) 19 Pick. 449. The easement to enter and erect the wall arises at the time of the agreement: payment or non-payment can have no effect upon its existence, mode of user, or value. Likewise the easement of support, once granted, cannot be divested or endangered by any act of B or his successors; nor does the covenant relate in any way to B's land. It has been suggested, however, that B also acquires an easement of support of the wall, for which the performance of his covenant operates as a recompense. *Roche* v. *Ulman, supra; King* v. *Wight, supra.* A covenant by the dominant as well as the servient tenant may bind his land, *Midland Ry. Co.* v. *Fisher* (1890) 125 Ind. 19; *Carr* v. *Lowry* (1856) 27 Pa. St. 257, although no interest of the covenantee in the covenantor's land is protected; but it must concern the easement or the land in which the easement is granted. *Wiggins Ferry Co.* v. *Ohio etc. Ry. Co.* (1879) 94 Ill. 83. The covenant by B has no reference to the land of A; *Gibson* v. *Holden, supra;* nor does it concern B's easement. At most it is a covenant to pay for an easement already acquired, or to be acquired. If the former, failure to perform it could not result in the destruction or impairment of the easement, as it might in the case of a covenant by a dominant owner to contribute to the cost of repairs to his easement, which has been held to run. *Wooliscroft* v. *Norton* (1862) 15 Wis. 198; *Maxon* v. *Lane* (1885) 102 Ind. 364. If the latter, the burden could not run, as there would be no interest with which it might run until payment or user. Moreover, such a construction should fall within the Rule against Perpetuities. Gray Perp. (2nd ed.) § 314. Upon every theory, except that of equitable lien, applicable in but few cases, a construction of these covenants as personal, as in New York, *Sebald* v. *Mulholland* (1898) 155 N. Y. 455, and impliedly in England, 1 COLUMBIA LAW REVIEW 257, is the sounder. 4 COLUMBIA LAW REVIEW 441.

RESTORATION OF *Status Quo* UPON RESCISSION OF INSURANCE CONTRACT.—Upon the rescission in equity of a performed or partly performed contract, the plaintiff must, first, show fraud or mistake; *Nace* v. *Boyer* (1858) 30 Pa. St. 99; second, be guilty of no laches; *Whitcomb* v. *Hardy* (1898) 73 Minn. 285; third, have made no election to affirm; *Betts* v. *Gunn* (1857) 31 Ala. 219; *Masson* v. *Bovet* (N. Y. 1845) 1 Den. 69; and fourth,